

FCC MAIL SECTION

Federal Communications Commission

FCC 00-141

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Geographic Partitioning and Spectrum)	WT Docket No. 96-148 ✓
Disaggregation by Commercial Mobile)	
Radio Services Licensees)	
)	
Implementation of Section 257 of the)	GN Docket No. 96-113
Communications Act --)	
Elimination of Market Entry Barriers)	

SECOND REPORT AND ORDER

Adopted: April 19, 2000

Released: May 19, 2000

By the Commission:

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1. On December 13, 1996, the Commission adopted the *Partitioning and Disaggregation Further Notice*,¹ which proposed modifying the Cellular Radiotelephone Service (cellular) geographic partitioning rules and adopting cellular spectrum disaggregation rules.² In this order, we adopt rules for spectrum disaggregation by cellular licensees. We further maintain our existing partitioning rules for initial cellular licensees, and extend partitioning rules to unserved area licensees. These actions increase the flexibility of our cellular rules, thereby creating new opportunities for small businesses to offer cellular service to the public and increasing competition among Commercial Mobile Radio Service (CMRS) providers. The rules will also promote the efficient use of spectrum while furthering uniformity among the rules applicable to CMRS providers.

II. EXECUTIVE SUMMARY

2. In this order, we adopt rules based on the proposals in the *Partitioning and Disaggregation Further Notice*, and continue the process of establishing similar partitioning and disaggregation rules for all cellular licensees in order to make more efficient use of the spectrum as follows:

- Cellular licensees may continue to partition their spectrum, and may also disaggregate their spectrum.
- Disaggregation of cellular spectrum is allowed for any amount of spectrum and there is no requirement that the disaggregator retain a minimum amount of spectrum.
- If disaggregation occurs after the initial licensee's build-out period, the disaggregatee may only use the disaggregated spectrum within the area comprised of the disaggregator's existing CGSA.
- Combined partitioning and disaggregation is permitted for cellular licensees.
- Both initial cellular licensees and unserved area licensees may partition and disaggregate.

¹ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21831 (1996) (*Partitioning and Disaggregation Report and Order*; *Partitioning and Disaggregation Further Notice*). The *Partitioning and Disaggregation Further Notice* included proposals for the General Wireless Communications Service (GWCS), which will be addressed in a separate proceeding.

² "Partitioning" is the assignment of geographic portions of a license along geopolitical or other boundaries. "Disaggregation" is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

- The license term for a cellular partitionee or disaggregatee shall be the remaining years of the original licensee's ten year license term.

III. BACKGROUND

3. In 1993, Congress amended sections 3(n) and 332 of the Communications Act of 1934, as amended (Communications Act), creating commercial mobile service as a new mobile service classification.³ One of the Congressional objectives in establishing CMRS was to ensure that similar mobile services are accorded similar regulatory treatment under the Commission's rules.⁴ The goal was the formation of a CMRS marketplace shaped by economic forces rather than disparate regulatory burdens.⁵ As discussed below, in crafting CMRS rules for partitioning and disaggregation, we have attempted to achieve this goal.

4. As the Commission noted in the *Partitioning and Disaggregation Further Notice*, it has previously examined partitioning and disaggregation issues for other services on a service-by-service basis. In the *Partitioning and Disaggregation Report and Order*, the Commission concluded that flexible partitioning and disaggregation rules will provide broadband PCS licensees with the flexibility to use their spectrum more efficiently, will increase opportunities for small businesses and other entities to enter into the broadband PCS market, and will speed PCS service to unserved areas.⁶ The Commission has adopted geographic partitioning and spectrum disaggregation rules for several services, *e.g.*, Multipoint Distribution Service (MDS),⁷ GWCS,⁸ 800 MHz and 900 MHz Specialized Mobile Radio (SMR),⁹ 39 GHz fixed point-to-point microwave,¹⁰ and the Wireless Communications Service (WCS).¹¹ The

³ See Implementation of Sections 3(n) and 322 of the Communications Act, *Second Report and Order*, 9 FCC Rcd. 1411, 1413-17 (1994). "In place of the statutory terminology, the Commission uses the term "commercial mobile radio service.""

⁴ *Id.* at 1418.

⁵ See Implementation of Sections 3(n) and 322 of the Communications Act, *Third Report and Order*, 9 FCC Rcd. 7988, 7994 (1994).

⁶ See *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd. at 21833.

⁷ Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd. 9589, 9614-15 (1995) (*MDS Report and Order*) (allowing partitioning of MDS licenses).

⁸ Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Second Report and Order*, 11 FCC Rcd. 624, 665 (1995) (*GWCS Second Report and Order*) (permitting rural telcos to partition GWCS licenses).

⁹ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, 12 FCC Rcd. 19079, 19127-53 (1997) (*800 MHz Second Report and Order*) (adopting flexible partitioning and disaggregation rules for all 800 MHz and 900 MHz SMR licensees).

¹⁰ Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd. 18600, 18634-36 (1997) (*39 GHz Report and Order*) (adopting partitioning and disaggregation rules for licenses in the 39 GHz band).

Commission tentatively concluded in the *Partitioning and Disaggregation Further Notice* that it is now appropriate to consider permitting full partitioning and disaggregation in cellular and "any other services that are licensed on a geographic area basis, or in spectrum blocks of sufficient size to make disaggregation practical."¹² Eight parties filed comments and five parties filed reply comments in response to the *Partitioning and Disaggregation Further Notice*.¹³ Additional *ex parte* presentations were filed supplementing the record.¹⁴

IV. DISCUSSION

A. Cellular Rules

1. Disaggregation

5. Background. The Commission's rules currently do not allow cellular licensees to disaggregate spectrum. In the *Partitioning and Disaggregation Further Notice*, the Commission sought comment on whether to permit cellular disaggregation and on whether there were unique constraints in the cellular service that would make disaggregation either impractical or administratively burdensome.¹⁵ The Commission also noted that it had recently concluded that cellular providers should be allowed to provide both fixed and mobile services.¹⁶ The Commission sought comment on whether interim cellular disaggregation rules should be adopted in anticipation of such regulatory changes.¹⁷

6. Discussion. We conclude that modifying our cellular rules to allow disaggregation will further promote competition and provide regulatory symmetry between cellular and other CMRS licensees. There was uniform consensus among the cellular commenters that we should modify the rules to allow disaggregation for cellular spectrum.¹⁸ As BellSouth and CTIA suggest, extending flexible disaggregation rules to cellular will bring immediate benefits to the public, such as allowing carriers to provide niche

¹¹ See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10834-10839, ¶ 92-103 (adopting partitioning and disaggregation rules for WCS licensees).

¹² See *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd. at 21875, ¶ 94.

¹³ See Appendix A for a list of commenters and reply commenters.

¹⁴ See Appendix A for a list of entities that submitted *ex parte* filings. We have also received several petitions for reconsideration of the *Partitioning and Disaggregation Report and Order*. Those petitions have been resolved separately. See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, WT Docket No. 96-148, *Memorandum Opinion and Order*, 65 FR at 25452 (May 2, 2000).

¹⁵ *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21876, ¶ 95.

¹⁶ *Id.* (citing Amendment to the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8965 (1996)).

¹⁷ *Id.*

¹⁸ AT&T Comments at 1; BANM Comments at 1; BellSouth Comments at 2; CTIA Comments at 2 and 5; SBC Comments at 2.

services and wireless networks inside buildings.¹⁹ The licensees will possess flexibility to tailor their service offerings to meet market demands, thus increasing competition as a result of new players entering the cellular market and enhancing the efficient use of spectrum.²⁰

7. With respect to whether it is technologically feasible to disaggregate spectrum used for cellular service, we agree with BANM that, in many markets, cellular carriers may not have a continuous need for the full 25 MHz of spectrum that they are licensed to use.²¹ BANM explains that the amount of spectrum needed for cellular operation depends on fluctuating peak and off-peak traffic levels, the technology used and the number of cell sites, among other factors.²² BANM argues that new digital technologies enable the same amount of traffic to be handled with less spectrum and that, as these technologies are deployed by cellular carriers, some spectrum may be available for other uses.²³

8. We find that there are no technical or other constraints unique to the cellular service that would make disaggregation either impractical or administratively burdensome.²⁴ We are therefore modifying the rules to permit cellular licensees to disaggregate portions of their spectrum to other eligible entities.²⁵ During the five-year build-out period for cellular MSAs and RSAs, initial cellular licensees may disaggregate any portion of their MSA or RSA. After the five year build-out period, initial cellular licensees may disaggregate spectrum within their existing Cellular Geographic Service Area (CGSA),²⁶ but may not disaggregate unserved areas outside the CGSA boundary, which will remain subject to licensing under our unserved area licensing rules. This restriction is necessary to ensure that initial cellular licensees and other parties do not use disaggregation to acquire licensing rights greater than those that attached to the original license. Similarly, we will allow cellular unserved area licensees to disaggregate spectrum within their designated licensing areas, but parties may not use disaggregation to acquire licensing rights that are not within the scope of the original unserved area license.

9. In the *Partitioning and Disaggregation Further Notice*, the Commission sought comment on whether minimum disaggregation standards are necessary for cellular.²⁷ We conclude that allowing flexibility in the amount of spectrum cellular licensees may disaggregate will promote more efficient use of

¹⁹ BellSouth Comments at 3; CTIA Comments at 2.

²⁰ *Id.*

²¹ BANM Comments at 2.

²² *Id.* at 2-3.

²³ *Id.* at 3.

²⁴ *Id.* at 2, n.3 (citing *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21876, ¶ 95).

²⁵ We agree with BellSouth that adoption of only "interim" cellular disaggregation rules would constitute a regulatory obstacle that would prevent the adoption of permanent measures. BellSouth Comments at 3 (citing *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21876, ¶ 95).

²⁶ A cellular CGSA is that portion of a cellular market, such as a Metropolitan Statistical Area (MSA) or Rural Service Area (RSA), for which the cellular licensee is currently providing service. See 47 C.F.R. §§ 22.99 and 22.911.

²⁷ *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21878, ¶ 100.

spectrum and permit deployment of a wider array of services.²⁸ We agree with BellSouth that no minimum disaggregation standard is necessary for the cellular service.²⁹ As the Commission did for broadband PCS, WCS, and 800 MHz and 900 MHz SMR, we believe the marketplace should decide the amount of cellular spectrum to be disaggregated and that there is no need to set a minimum disaggregation amount. We will provide the parties with flexibility to structure disaggregation agreements to best suit their needs and the demands of the local market. Adopting a minimum disaggregation amount for these services would only delay disaggregation and would interfere with the parties' intended use of the spectrum.

2. Partitioning

10. Background. The Commission's current rules permit partitioning by cellular licensees.³⁰ The cellular partitioning rule, however, is different from the partitioning rules we have recently adopted for geographically licensed services such as broadband PCS. In broadband PCS, licensees are authorized to construct and operate transmitting facilities throughout certain predefined market areas. Under this market-based licensing scheme, licensees are permitted to partition any portion of their markets on a geographic basis at any time during the term of their license. In the case of cellular, however, initial cellular licensees may partition within their MSAs and RSAs only within the initial five-year build-out period of the license.³¹ After the five year build-out period, initial cellular licensees are limited to partitioning within their previously established CGSAs, because territory outside the CGSA reverts to the Commission for licensing under the unserved area rules.³² The cellular partitioning rules also make no express provision for partitioning by unserved area licensees.

11. The Commission sought comment in the *Partitioning and Disaggregation Further Notice* as to whether the current cellular partitioning rules are sufficiently flexible to increase the viability and value of partitioned cellular licenses.³³ The Commission sought to determine whether the existing cellular rules should be amended to further facilitate partitioning and what types of alternative partitioning mechanisms might be adopted.³⁴ The Commission noted that the current partitioning rules allow the parties to define the size of the partitioned cellular license area and that the Commission did not propose to change this rule.³⁵

12. Discussion. After examining the issues in this proceeding, we have decided to retain our existing cellular partitioning rules for initial cellular licensees, and to provide for partitioning by unserved area licensees. We recognize that the current cellular partitioning rules are different from the rules for

²⁸ *Id.*; see also BellSouth Comments at 4 (discussing niche services and in-building services).

²⁹ See BellSouth Comments at 4.

³⁰ See 47 C.F.R. § 22.947.

³¹ *Id.* The licensee of the first cellular system on each channel block may enter into contracts with eligible parties, allowing such parties to apply for a new cellular system within the MSA or RSA market.

³² See 47 C.F.R. § 22.911.

³³ *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21878, ¶ 102.

³⁴ *Id.*

³⁵ *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21877, ¶ 98.

geographically licensed services because of the restriction on cellular partitioning outside the CGSA after the initial five-year build-out period. However, as in the case of disaggregation, discussed above, this restriction ensures that our cellular partitioning rules do not conflict with our unserved area rules, and that partitioning cannot be used to acquire licensing rights greater than those that attached to the original license. Moreover, we find that the current cellular partitioning rules are sufficiently flexible so as not to place cellular licensees at a competitive disadvantage when compared to other CMRS. Due to the distinctive nature of cellular licensing, we find no conflict with Congress's goal of promoting regulatory parity among CMRS.³⁶ Therefore, after the five-year build-out period, we will allow initial cellular licensees to partition portions of their CGSAs.

13. Cellular unserved areas will continue to be subject to the Commission's unserved area rules at the conclusion of the five year build-out period. We also believe that cellular unserved area licensees should have the ability to partition their service areas. As in the case of initial cellular licensees, we will allow cellular unserved area licensees to disaggregate spectrum within their designated licensing areas during the initial build-out period of the license. In the case of unserved area licenses, however, the build-out period is 12 months rather than five years. Therefore, after the expiration of the 12 month build-out period, an unserved area licensee may not partition outside of the licensing area established as a result of the build-out process.

3. Construction Requirements

14. Background. In the *Partitioning and Disaggregation Further Notice*, the Commission did not propose to change the cellular build-out procedures, but sought comment on whether the rules might be amended to facilitate cellular partitioning and what types of alternative partitioning mechanisms might be adopted.³⁷ With respect to disaggregation, the Commission sought comment on whether it should adopt a disaggregation certification procedure similar to the type adopted for broadband PCS, whereby the parties would be required to certify in their disaggregation application which party will be responsible for building out the remainder of the market.³⁸

15. Discussion. We will retain the existing cellular construction rules as they apply to partitioning. We agree with CTIA that these existing rules provide sufficient flexibility for cellular licensees to build out their markets and to respond to market demands for service.³⁹ Thus, where a cellular licensee partitions its license prior to the expiration of the relevant build-out period (five years for initial licensees or 12 months for unserved area licensees), each partitionee will be responsible for completing the build-out in its respective partitioned area within the remainder of the original build-out period. Any area that remains unbuilt at the conclusion of the build-out period will revert to the Commission and be available for unserved area licensing. We find that these requirements will afford cellular licensees the needed flexibility to negotiate and select build-out options that best suit their business plans and strategies.⁴⁰ With respect to disaggregation, we will adopt a disaggregation certification procedure similar

³⁶ AT&T Comments at 1-2; BANM Comments at 3.

³⁷ *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21879, ¶ 103.

³⁸ *Id.* at 21879, ¶ 104.

³⁹ See CTIA Comments at 9.

⁴⁰ *Id.*

to the type adopted for broadband PCS, whereby the parties would be required to certify in their disaggregation application which party will be responsible for building out the licensed area.⁴¹

16. We further note that cellular partitionees and disaggregates generally are responsible for complying with the technical and operational rules established for original cellular licensees. For example, section 22.901(d) establishes an analog compatibility standard that the original licensee must satisfy, which allows cellular subscribers to use their mobile phones when roaming on other cellular networks. Thus, a cellular partitionee or disaggregate that is providing mobile service must comply with this requirement.

B. Related Matters

17. In addition to the service-specific requirements outlined above, the *Partitioning and Disaggregation Further Notice* also sought comment on some partitioning and disaggregation issues common to cellular such as: (1) whether to allow combined partitioning and disaggregation; (2) whether parties obtaining partitioned or disaggregated licenses should receive the remainder of the original licensee's license term; and (3) what procedures to adopt for reviewing partitioning and disaggregation proposals. We find that the public interest will be served by adopting the following changes to our rules to permit cellular partitioning and disaggregation in a fashion similar to what we have allowed for other CMRS.

1. Combined Partitioning and Disaggregation

18. Background. In the *Partitioning and Disaggregation Further Notice*, the Commission tentatively concluded that it should permit combined partitioning and disaggregation for cellular.⁴²

19. Discussion. Subject to the other limitations set forth herein, we adopt this proposal. In the broadband PCS and 800 MHz and 900 MHz SMR proceedings, the Commission found that allowing combined partitioning and disaggregation would further facilitate such arrangements.⁴³ We believe the same rationale applies to cellular. We agree with BellSouth that such combinations are necessary to provide the flexibility cellular licensees will need to react to market forces and demands for service.⁴⁴ Allowing combined cellular partitioning and disaggregation also will advance our goals of promoting competitive service offerings, encouraging new market entrants, and ensuring quality service to the public.⁴⁵

2. License Term and Renewal Expectancy

20. Background. Cellular licenses are granted for ten year terms,⁴⁶ and licensees may receive

⁴¹ *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21879, ¶ 104.

⁴² *Id.* at 21878, ¶ 101.

⁴³ *See Partitioning and Disaggregation Report and Order*, 11 FCC Rcd. at 21866; *800 MHz Second Report and Order*, 12 FCC Rcd. at 19150-51.

⁴⁴ BellSouth Comments at 5.

⁴⁵ *See 800 MHz Second Report and Order*, 12 FCC Rcd. at 19150, ¶ 217.

⁴⁶ *See Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21880, ¶ 108 (citing 47 C.F.R. • •

renewal expectancy if they demonstrate that they have provided substantial service during their license term and that they have substantially complied with the Commission's rules and the Communications Act.⁴⁷ Substantial service is defined as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal."⁴⁸ In the *Partitioning and Disaggregation Further Notice*, the Commission sought comment on whether cellular partitionees and disaggregatees should be afforded the same renewal expectancy.⁴⁹ The Commission's rules do not state how to handle the license term or renewal expectancy for a cellular license acquired through partitioning or disaggregation. However, the informal practice for cellular service has been for the partitioned license term to begin anew from the date the partial assignment application is granted. In the *Partitioning and Disaggregation Report and Order*, the Commission found that allowing parties acquiring partitioned broadband PCS licenses or disaggregated broadband PCS spectrum to "re-start" the license term from the date of the grant of the partial assignment application could allow parties to circumvent our established license term rules and unnecessarily delay service.⁵⁰ The Commission tentatively concluded that limiting the license term of the cellular partitionee or disaggregatee to the remainder of the original licensee's ten-year license term would ensure that parties pursue available spectrum as quickly as practicable.⁵¹

21. Discussion. We agree with CTIA and SBC that the license terms for partitioned and disaggregated cellular licenses should be limited to the remaining term of the underlying license. This will prevent licensees and other parties from circumventing the Commission's license term rules, and is consistent with the approach we have adopted for other CMRS.⁵² In addition, we agree with AT&T that renewal expectancy provisions for cellular partitionees and disaggregatees should be similar to those we have adopted for other CMRS.⁵³ Thus, partitionees and disaggregatees in the cellular services may obtain renewal expectancy on the same basis as initial cellular licenses and other CMRS licensees.

3. Licensing Issues

22. Background. In the *Partitioning and Disaggregation Further Notice*, the Commission noted that partial assignment procedures are used for cellular partitioning and that the current cellular partitioning rule provides for reviewing and licensing partitioning arrangements.⁵⁴ Therefore, the Commission did not propose to change the method for reviewing and licensing cellular partitioning

22.144(a) and 26.13).

⁴⁷ See 47 C.F.R. §§ 22.940(a)(1)(i)-(ii) and 26.14.

⁴⁸ 47 C.F.R. §§ 22.940(a)(1)(i) and 26.14(a).

⁴⁹ See *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21880, ¶ 109.

⁵⁰ See *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd. at 21870, ¶ 77.

⁵¹ See *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21881, ¶ 109.

⁵² CTIA Comments at 10; SBC Comments at 3.

⁵³ AT&T Comments at 4.

⁵⁴ See *Partitioning and Disaggregation Further Notice*, 11 FCC Rcd. at 21882, ¶ 112 (citing 47 C.F.R. § 22.947(b)).

arrangements.⁵⁵ The Commission did, however, seek comment on the method it should devise for reviewing cellular disaggregation transactions.⁵⁶ The Commission proposed using the same procedures adopted for broadband PCS.⁵⁷

23. Discussion. Upon further review, we decline to change our current procedure for reviewing and licensing cellular partitioning transactions. We further adopt these procedures for reviewing and licensing disaggregation transactions. The information that we currently require is necessary to determine the CGSA of licensees.

V. CONCLUSION

24. We adopt rules that permit a cellular licensee to disaggregate its spectrum. The rules adopted herein will provide cellular licensees with the flexibility to structure partitioning and disaggregation agreements that other CMRS providers possess. These rules also represent another step in our continuing efforts to provide CMRS licensees with the flexibility they need to structure unique business arrangements and to respond to market demands for service. These changes will result in more efficient use of spectrum, increased opportunities for small businesses and other entities to enter the cellular marketplace, and will speed service to unserved areas.

VI. PROCEDURAL MATTERS

A. Ordering Clauses

25. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 4(i), 257, 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(g), 303(r), and 332(a), Part 22 of the Commission's Rules, 47 C.F.R. §§ 22.1, *et seq.*, IS AMENDED as set forth in Appendix B below.

26. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE thirty days after the date of publication in the Federal Register. This action is taken pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j).


⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

B. Regulatory Flexibility Act

27. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**LIST OF COMMENTERS**Comments

Airtouch Paging and PowerPage, Inc. (Airtouch & PowerPage)
AT&T Wireless Services, Inc. (AT&T Wireless)
Bell Atlantic NYNEX Mobile, Inc. (BANM)
Benbow PCS Ventures, Inc. (Benbow)
BellSouth Corporation (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
Rural Telecommunications Group (RTG)
SBC Communications, Inc. (SBC)

Reply Comments

CTIA
Independent Alliance
National Telephone Cooperative Association (NTCA)
Organization for the Promotion and Advancement of Small Telecommunications
Companies (OPASTCO)
RTG

Ex Parte Filings

Adams Telephone Cooperative
CTIA
Five Areas Telephone Cooperative Organization, Inc.
Leaco Rural Telephone Cooperative, Inc.
Central Texas Telephone Cooperative, Inc.

APPENDIX B**FINAL RULES**

Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. New Sec. 22.948 is added as follows:

Sec. 22.948 Partitioning and disaggregation.

(a) *Eligibility.*

(1) *Generally.* Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to Sec. 1.948. Cellular licensees may partition or disaggregate their spectrum to other qualified entities.

(2) *Partitioning.* During the five year build-out period, as defined in Sec. 22.947, cellular licensees may partition any portion of their cellular market to other qualified entities. After the five year build-out period, cellular licensees and unserved area licensees may partition any portion of their Cellular Geographic Service Area (CGSA), as defined by Sec. 22.911, to other qualified entities but may not partition unserved portions of their cellular market.

(3) *Disaggregation.* After the five year build-out period, as defined in Sec. 22.947, parties obtaining disaggregated spectrum may only use such spectrum in that portion of the cellular market encompassed by the original licensee's CGSA and may not use such spectrum to provide service to unserved portions of the cellular market.

(b) *Disaggregation.* Cellular licensees and unserved area licensees may disaggregate spectrum in any amount.

(c) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignment of cellular licenses that propose combinations of partitioning and disaggregation.

(d) *License Term.* The license term for the partitioned license area and for disaggregated spectrum shall be the remainder of the original cellular licensee's or the unserved area licensee's license term as provided for in Sec. 22.144(a).

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

Second Report and Order

As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. • 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rulemaking (*Further Notice*) in WT Docket No. 96-148.⁵⁸ The Commission sought written public comment on the proposals in the *Further Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Second Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.⁵⁹

A. Need for and Purpose of this Action:

In this *Second Report and Order*, we modify our rules for the Cellular Radiotelephone Service (cellular) to permit partitioning and disaggregation for all licensees in these services. The rules adopted herein also implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. § 309(j)(4)(D) and reduce entry barriers for small businesses in accordance with 47 U.S.C. § 257. With flexible partitioning and disaggregation, additional entities, including small businesses, may participate in the provision of cellular service without needing to acquire wholesale an existing license (with all of the bundle of rights currently associated with the existing license). Acquiring "less" than the current license will presumably be a flexible and less expensive alternative for entities desiring to provide these services.

B. Description and Number of Small Entities Involved

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.⁶⁰ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁶¹ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁶² Nationwide, there are 275,801 small organizations.⁶³ In addition, the term "small business" has the same meaning as the term "small business

⁵⁸ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, FCC 96-287, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 10187 (1996)

⁵⁹ Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) codified at 5 U.S.C. § 601, *et seq.*)

⁶⁰ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

⁶¹ 5 U.S.C. § 601(6).

⁶² 5 U.S.C. § 601(4).

⁶³ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

concern" under section 3 of the Small Business Act.⁶⁴ Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).⁶⁵

The rules adopted in the *Second Report and Order* will affect all small businesses which avail themselves of these rule changes, including small businesses currently holding cellular licenses who choose to partition and/or disaggregate, and small businesses that may acquire licenses through partitioning and/or disaggregation. We have not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.⁶⁶ The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.⁶⁷

The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, is the most recent information available. This document shows that only twelve radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.⁶⁸ Therefore, even if all twelve of these large firms were cellular telephone companies, nearly all of the cellular carriers were small businesses under the SBA's definition. We assume, for purposes of this FRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data that we publish annually in our *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Services (PCS) licensees in one group. According to the data released in November 1997, there are 804 companies reporting that they engage in cellular or PCS service.⁶⁹ It seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees; however, we are unable at this time to estimate with greater precision the number of cellular service carriers qualifying as small business concerns under the SBA's definition. For purposes of this FRFA, we estimate that there are fewer than 804 small cellular service carriers.

⁶⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. • 632).

⁶⁵ 15 U.S.C. § 632.

⁶⁶ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

⁶⁷ U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

⁶⁸ Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

⁶⁹ FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997).

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The rules adopted in this *Second Report and Order* will impose reporting and recordkeeping requirements on small businesses seeking licenses through partitioning and disaggregation. The information requirements will be used to determine whether the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. Any applicant requesting such a license, will provide this information in a one-time filing. The applicant will submit this information on a FCC Form 490 Application for Assignment of Authorization or Consent to Transfer of Control of License. The applicant will also submit an FCC Form 430 Licensee Qualification Report if one is not already on file with us, and an FCC Form 600 Application for Mobile Radio Service Authorization. These forms are currently in use and have already received Office of Management and Budget clearance. We estimate that the average burden on the applicant is three hours for the information necessary to complete these forms. We further estimate that seventy-five percent of the respondents (which may include small businesses) will contract out the burden of responding. Finally, we estimate that it will take approximately thirty minutes to coordinate information with those contractors. The remaining twenty-five percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information.

E. Steps Taken to Minimize Burdens on Small Entities:

The rules adopted in this *Second Report and Order* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services and are consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services.

Allowing non-restricted partitioning of licenses will facilitate market entry by parties who may lack the financial resources for participation in auctions, including small businesses. Some small businesses may have been unable to obtain cellular licenses through sale due to high asking prices. By eliminating this restriction and allowing flexible partitioning, small businesses will be able to obtain partitioned licenses for smaller service areas at presumably reduced costs, thereby providing a method for small businesses to enter the cellular marketplace.

Similarly, allowing immediate disaggregation of cellular licenses will facilitate the entry of new competitors to the provision of these services, many of whom will be small businesses seeking to acquire a smaller amount of spectrum at a reduced cost. Additionally, allowing disaggregation of spectrum in any amount will also promote participation by small businesses who may seek to acquire a smaller amount of cellular spectrum tailored to meet the needs of their proposed service.

F. Significant Alternatives Considered and Rejected:

We considered and rejected several alternative proposals concerning partitioning and disaggregation:

We considered and rejected the option of continuing to disallow disaggregation of cellular spectrum. We concluded that permitting disaggregation would promote competition and further regulatory symmetry, and that there were no technical or other constraints that would make cellular disaggregation either impractical or administratively burdensome.

We declined to establish any minimum amount of spectrum that can be disaggregated. We concluded that allowing flexibility in disaggregation would promote more efficient use of spectrum and permit deployment of a wider array of services.

We declined to allow additional flexibility in our cellular partitioning rules. We concluded that our existing rules are sufficiently flexible so as not to place cellular licensees at a competitive disadvantage compared to other CMRS, and that additional flexibility would be inconsistent with our cellular unserved area rules.

We declined to apply a new license term to partitioned license areas or disaggregated spectrum. We found that allowing parties to "re-start" their license term would effectively allow a licensee to extend its license term and could lead to circumvention of our license term rules.

G. Report to Congress

We shall include a copy of this Final Regulatory Flexibility Analysis, along with this *Second Report and Order*, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.